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# COLUMBIA LAW REVIEW.

**Published monthly during the Academic Year by Columbia Law Students.**

SUBSCRIPTION PRICE, $2.50 PER ANNUM 35 CENTS PER NUMBER

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# NOTES.

LIABILITY OF RAILROAD RIGHT OF WAY FOR SPECIAL ASSESSMENTS.—The divergent results reached in the decisions dealing with the right of municipalities to levy assessments for local improvements upon the property of railroad companies, though accounted for in large part by the varying provisions of state statutes and constitutions, depend at bottom upon the conflict of opinion as to the principles underlying the power to impose special assessments. The justification for the imposition of such assessments has often been stated to be the special benefit conferred upon the contiguous property by the improvement.[1] And, although it would follow that any assessment substantially in excess

[1] 2 Cooley, Taxation (3rd ed.) 1153; Hamilton, Special Assessments, § 3; see Harlan, J., dissenting, in French *v.* Barber Asphalt Co. (1901) 181 U. S. 324, 346.

of this benefit should not be sustained,[2] it has been repeatedly declared by the Supreme Court that an apportionment exceeding the enhancement of value of the property is not violative of the Fourteenth Amendment.[3] And the courts of many states take the same position in declaring that the legislative determination of the property benefited and the mode of apportionment is conclusive.[4] On the other hand, a few courts have exempted railroad rights of way[5] from these burdens by declaring as a matter of law that such property cannot be benefited by the typical local improvement,[6] such as street paving or grading. But the question of benefit is obviously a question of fact, and, it is submitted, not properly determinable *a priori* by either court or legislature. In some jurisdictions this doctrine is clearly recognized.[7] As to the basis upon which the benefit is to be estimated, however, even these authorities are not in accord.

Generally, benefit is measured by the enhancement of the market value of the property in question, and in the majority of jurisdictions this rule is applied to assessments upon rights of way.[8] On principle, however, it seems clear that assessments upon this class of property should not be determined by this general standard. Property of the corporation which is essential to the operation of the road is regarded as permanently devoted to the public use; a sale of this property would violate the carrier's duty to the public, and expose it to the forfeiture of its franchise.[9] Since a violation is not to be presumed, a

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[2]If the improvements are made under the police power, it seems the question of benefit is irrelevant. Chicago etc. Ry. *v.* Janesville (1908) 137 Wis. 7, 28 L. R. A. [N. S.] 1124 and note.

[3]Parsons *v.* District of Columbia (1898) 170 U. S. 45; Louisville etc. R. R. *v.* Barber Asphalt Co. (1905) 197 U. S. 430; but see dictum in Martin *v.* District of Columbia (1907) 205 U. S. 135.

[4]Ludlow *v.* Cincinnati Southern Ry. (1880) 78 Ky. 357; Northern Pac. Ry. *v.* Seattle (1907) 46 Wash. 674.

[5]A distinction must be observed between property vitally necessary for the conduct of the business, as the right of way, and property held for future extensions, or used for warehouses, stations, etc. Assessments against property of the latter class are almost universally sustained, and may be enforced by judicial sale. Georgia R. R. *v.* Decatur (1912) 137 Ga. 537, 40 L. R. A. [N. S.] 935 and note; Chicago, etc. Ry. *v.* Milwaukee (1895) 89 Wis. 506, 28 L. R. A. 249 and note; *contra,* Matter of City of New York (N. Y. 1908) 127 App. Div. 672.

[6]See Naugatuck R. R. *v.* Waterbury (1905) 78 Conn. 193; Philadelphia *v.* Phila. etc. R. R. (1859) 33 Pa. 41.

[7]Sears *v.* Boston (1899) 173 Mass. 71; State, Agens, Pros. *v.* Newark (1874) 37 N. J. L. 415. While there is much merit in the practical argument that the courts would be overburdened by the task of deciding the existence of equivalent benefits upon the numerous complaints growing out of local assessments, it is submitted that the landowner should at least be allowed a hearing upon the question of benefit before a quasi-judicial commission. The right to such a hearing is secured in the majority of the states, see note to Chicago etc. Ry. *v.* Janesville (Wis. 1908) 28 L. R. A. [N. S.] 1124, 1201, but its absence has been held not subversive of the Fourteenth Amendment. See Spencer *v.* Merchant (1888) 125 U. S. 345.

[8]Northern Pac. Ry. *v.* Seattle, *supra;* Louisville, etc. R. R. *v.* Barber Asphalt Co., *supra.*

[9]By similar reasoning it is usually held that for the purposes of these assessments a perpetual easement of right of way is to be regarded as a corporeal interest in fee. Northern Pac. Ry. *v.* Seattle, *supra.*

market value cannot be predicated of such property. The benefit is rather to be measured by the increased value of the right of way for its use in the public service, a test which is applied in a few jurisdictions.[10] The argument of public policy has been still further extended in other states, where it is held that rights of way are completely exempt from local burdens because of their dedication to a public use, after the analogy to highways and governmental property.[11] But it seems difficult to justify this exemption in view of the fact that railroad corporations are universally liable for general taxes.[12]

A more critical question has arisen in those jurisdictions where assessments upon railroad property are permitted, from the frequent attempt to enforce the lien by the sale of the portion of the right of way contiguous to the improvement. By those courts which regard such property as subject to the ordinary incidents of special assessments, this remedy has been readily granted.[13] But the drastic consequences of breaking up the continuity of a railroad system by sales of detached portions of its road-bed has led other tribunals to forbid the coercion of payment by this process in the absence of clear legislative authority.[14] To this effect is the recent case of *City of Decatur* v. *Southern Ry.* (Ala. 1913) 62 So. 855, in which the court overruled the city's demurrer to a bill by the carrier to restrain the sale of a portion of its right of way to enforce the payment of an assessment for the opening of an adjacent street; a conclusion which seems thoroughly sound.

From this holding, however, it would seem to follow that in those jurisdictions which require the existence of equivalent benefits upon all property assessed, the inability to enforce the lien against the railroad property would frustrate the formation of a taxing district including a part of its road-bed. To avoid this dilemma, the courts of Indiana have allowed in lieu of a lien on a right of way, a personal judgment against the carrier enforcible by the sale of its personalty not essential to the performance of its public duty.[15] But it has been frequently urged that by this process property is taken without due process of law,[16] and on this ground a personal judgment is denied as a common law right in many jurisdictions,[17] while in others, statutes imposing this liability have been held unconstitutional.[18] This objec-

[10]New York Bay R. R. *v.* Newark (1912) 82 N. J. L. 591; River Forest *v.* Chicago etc. Ry. (1902) 197 Ill. 344.

[11]Boston *v.* Boston etc. R. R. (1898) 170 Mass. 95.

[12]Heman Construction Co. *v.* Wabash R. R. (1907) 206 Mo. 172; see notes to this case in 12 L. R. A. [N. S.] 112 and 12 Ann. Cas. 630.

[13]Northern Indiana R. R. *v.* Connelly (1859) 10 Oh. St. 159; *cf.* Chicago etc. Ry. *v.* Elmhurst (1897) 165 Ill. 148.

[14]Chicago, etc. Ry. *v.* Milwaukee, *supra;* Plymouth R. R. *v.* Colwell (1861) 39 Pa. 337.

[15]Louisville, etc. Ry. *v.* Boney (1888) 117 Ind. 501. By statute Pennsylvania gives the creditor the right of sequestration. Susquehanna Canal Co. *v.* Bonham (1845) 9 W. & S. 27.

[16]2 Elliott, Roads and Streets (3rd ed.) §§ 706-7.

[17]Green *v.* Ward (1886) 82 Va. 324; Barber Asphalt Co. *v.* Watt (1899) 51 La. Ann. 1345.

[18]St. Louis *v.* Allen (1873) 53 Mo. 44; Brookings *v.* Natwick (1908) 22 S. Dak. 322; see notes to this case in 18 L. R. A. [N. S.] 1259 and 17 Ann. Cas. 1254.

tion would seem to have no validity, however, if the amount of the judgment be limited to the benefit conferred. The result reached by the Indiana courts, therefore, seems adequate to safeguard the interests of both the general public and of the municipality and to furnish a logical application of the requirement of equivalent benefits in local assessments.

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DISSOLUTION OF JUDICIAL LIENS UPON EXEMPT PROPERTY.—The exclusive power to determine what property of the bankrupt is exempt under the state laws is vested in the federal courts of bankruptcy.[1] In the exercise of this power the court's jurisdiction has often been regarded as limited to the determination of the validity of the claim to exemption, and to the segregation of the exempt property.[2] Nevertheless, there has been a distinct tendency to enlarge this jurisdiction along two lines. On the one hand, by an analogy to cases where the court decides whether the bankrupt has lost his right to an exemption by his fraud,[3] it is deemed permissible to inquire whether for any other reason the right cannot be exercised, and thereby to pass judgment upon conflicting liens and claims.[4] A similar exercise of jurisdiction, on the other hand, has been justified upon the ground that the administration of exempt property on behalf of those holding waivers of exemption entails no disposition of exempt property, since it is not really exempt as to such creditors.[5]

As a result of their varying exercise of jurisdiction over exempt property the lower federal courts are in conflict as to their ability to invoke the operation of § 67f[6] to dissolve, as preferences, all liens upon exempt property which were acquired within the four months' period.

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[1] § 2 (11) Bankruptcy Act. Lucius *v.* Cawthon-Coleman Co. (1905) 196 U. S. 149; McGahan *v.* Anderson (C. C. A. 1902) 113 Fed. 115. A state court cannot review the decision of a federal court as to what is an exemption. Woolfolk *v.* Murray (1871) 44 Ga. 133; Maxwell *v.* McCune (1872) 37 Tex. 515. If the bankrupt fails to claim, or is not entitled to any exemption, the property passes to the trustee with the rest of his estate. *In re* West (D. C. 1902) 116 Fed. 767; *In re* Stephens (D. C. 1902) 114 Fed. 192; *In re* Donahey (D. C. 1910) 176 Fed. 458; *cf. In re* Schuller (D. C. 1901) 108 Fed. 591. Under §§ 6a and 70a of the Bankruptcy Act, once property is set aside as exempt, all claims to it must be litigated in the state courts. *In re* Paramore & Ricks (D. C. 1907) 156 Fed. 211; *In re* Seydel (D. C. 1902) 118 Fed. 207; *In re* Little (D. C. 1901) 110 Fed. 621.

[2] *In re* Jackson (D. C. 1902) 116 Fed. 46; *In re* Culwell (D. C. 1908) 165 Fed. 828; see *In re* Strickland (D. C. 1909) 167 Fed. 867.

[3] *In re* Schafer (D. C. 1907) 151 Fed. 505; *In re* Ansley (D. C. 1907) 153 Fed. 983.

[4] *In re* Highfield (D. C. 1908) 163 Fed. 924; see *In re* Lucius (D. C. 1903) 124 Fed. 455. For a discussion of the forfeiture of the right to claim an exemption because of fraud, see 1 Columbia Law Rev. 399; Loveland, Bankruptcy § 424.

[5] *In re* Gordon (D. C. 1902) 115 Fed. 445; *In re* Boyd (D. C. 1903) 120 Fed. 999; *In re* Antigo Screen Door Co. (C. C. A. 1903) 123 Fed. 249.

[6] "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged. * * *"